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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

AUNYX CORPORATION and AUNYX BUSINESS MACHINES CORPORATION,

PETITIONERS

v.

CANON U.S.A., INCORPORATED,

RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

REPLY BRIEF FOR PETITIONERS

BLAIR L. PERRY
5 Gerard Terrace
Lexington, MA 02173
(617) 542-5070

Counsel of Record
for Petitioners

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Related Companies

Companies related to the petitioners are noted at page ii of the petition. Companies related to the respondent are listed at page ii of the Brief in Opposition.

I. THERE IS A DIRECT CONFLICT BETWEEN THE CIRCUITS WITH RESPECT TO THE RES JUDICATA EFFECT TO BE GIVEN TO ITC DECISIONS ON CLAIMS WITHIN THE EXCLUSIVE JURISDICTION OF THE DISTRICT COURTS.

In Section IV of the petition, at pages 39-42, the petitioners have pointed to a direct conflict between the decision of the Court of Appeals for the First Circuit in the present case and the decision of the Court of Appeals for the Ninth Circuit in Stevenson v. Grentec, Inc., 652 F.2d 20 (9th Cir. 1981), cert. denied 456 U.S. 943.

In its Brief in Opposition, at pages 14-16, the respondent denies the existence of the conflict, asserting that the present case involves the res judicata effect to be given to an antitrust claim (albeit one which the ITC declined to hear) whereas Stevenson denied res judicata effect in a patent matter, and pointing to the fact that the Court of Appeals for the Second Circuit gave res judicata effect to an ITC decision in a case involving infringement of a common

law trademark and unfair competition, Union Manufacturing Co., Inc. v. Han Baek Trading Co., Ltd., 763 F.2d 42 (2d Cir. 1985).

The respondent has overlooked the crucial distinction between the Aunyx and Stevenson cases on the one hand and the Union Manufacturing case on the other.

While it is true that the present case involves antitrust issues while the Stevenson case involved patent issues, that distinction is meaningless. The cases are alike in that exclusive jurisdiction is granted to the United States District Courts in both antitrust cases (see pages 36-38 of the petition) and patent cases (see 28 U.S.C. 1338(a), set forth at page 4 of the petition). The Union Manufacturing case is unlike the Aunyx and Stevenson cases in that the United States District Courts do not have exclusive jurisdiction over trademark cases or unfair competition cases (see 28 U.S.C. 1338).

It is the grant of exclusive jurisdiction to the United States District Courts in both antitrust cases and patent cases which precludes the granting of res judicata effect to ITC decisions in both types of cases. The split between the circuits is genuine and unavoidable.

II. JURISDICTION OF THE ITC TO DECIDE AN "ANTITRUST-BASED CLAIM" FOR A VIOLATION OF SECTION 337 IS NOT THE SAME AS JURISDICTION TO DECIDE AN ANTITRUST CLAIM FOR VIOLATION OF SECTION 1 OF THE SHERMAN ACT. THE LATTER IS RESERVED TO THE UNITED STATES DISTRICT COURTS.

The International Trade Commission is authorized by the provisions of Section 337 of the Tariff Act of 1930, 19 U.S.C. 1337, which is set out in full at pages 124-138 of the petition, to impose sanctions against certain "Unfair methods of competition and unfair acts" including those "the effect or tendency of which is to . . . restrain or monopolize trade and commerce in the United States. . . ."

Those "unfair methods of competition" which violate Section 1 of the Sherman Act, 15 U.S.C. 1, or Section 2 of the Sherman Act, 15 U.S.C. 2, may be found also to violate Section 337 of the Tariff Act of 1930. Compare Federal Trade Commission v. Cement Institute, 333 U.S. 683, 690, 693 (1948) (conduct which violates Sherman Act also may violate section 5 of the Federal Trade Commission Act, 15 U.S.C. 45).

In its Brief in Opposition the respondent has used repeatedly the term "antitrust-based claims" to identify or describe claims asserted under Section 337 which are based on conduct also violative of Section 1 or 2 of the Sherman Act. (See Brief in Opposition at pages 9, 10, 11, 12, 16 and 17.)

But the fact that the ITC has jurisdiction to decide what the respondent calls "antitrust-based claims" does not mean that the ITC has jurisdiction to decide antitrust

claims as such. That jurisdiction the ITC lacks, because exclusive jurisdiction to decide antitrust claims and to award treble damages for violations has been granted to the United States District Courts, as explained in Section III of the petition, at pages 36-38, where relevant authorities are cited.

What is the significance of the fact that the ITC has no jurisdiction to decide a claim under Section 1 of the Sherman Act? Simply this. That a plaintiff in a Section 337 proceeding before the ITC cannot be barred from later asserting an antitrust claim in a United States District Court on the theory that the claim could have been asserted in the ITC, where the antitrust claim as such could not have been asserted in the ITC and no similar or related claim under Section 337 actually was decided by the ITC. See Montana v. United States, 440 U.S. 147, 153 (1979).

If an "antitrust-based claim" under Section 337 actually is asserted in the ITC and actually is decided against the plaintiff after a hearing in the ITC, the plaintiff may be precluded from thereafter asserting in another forum a claim which is based upon the same conduct of the defendant. See, for example, Marrese v. American Academy of Orthopaedic Surgeons, 470 U.S. 373, 386 (1985) (state court decision), and United States v. Utah Construction & Mining Co., 384 U.S. 394, 422 (1966) (agency decision).

But that is not what happened in the present case.

The Statement of the Case set forth at pages 1-9 of the Brief in Opposition is argumentative and confusing.

Reduced to a skeletal sequence, the relevant proceedings below in this matter were the following:

1. Aunyx commenced simultaneous proceedings against Canon in the ITC and in the U.S. District Court for the District of Massachusetts.

2. The complaint filed in the ITC included "antitrust-based claims" under Section 337, but no claim of horizontal conspiracy.

3. The complaint filed in the U.S. District Court included antitrust claims, but no claim of horizontal conspiracy.

4. After discovery in the ITC case produced evidence of a horizontal conspiracy between Canon and its dealers, Aunyx moved for leave to amend the complaint in the ITC to add a claim based upon horizontal conspiracy. Canon opposed this motion, and the motion was denied.

5. The "antitrust-based claims" asserted in the ITC by Aunyx were decided against Aunyx. (These did not include the

claim of horizontal conspiracy, because the ITC refused to hear that claim.)

6. Aunyx filed an amended complaint in the U.S. District Court, with leave of court, adding to its claims an antitrust claim of horizontal conspiracy under Section 1 of the Sherman Act.

7. Aunyx abandoned an appeal to the U.S. Court of Appeals for the Federal Circuit, thus leaving intact the adverse decision of the ITC on the "antitrust-based claims" actually decided by the ITC.

8. Canon moved for summary judgment in the U.S. District Court, claiming that Aunyx's antitrust claims were barred by res judicata principles. The U.S. District Court allowed the motion with respect to those claims corresponding to the "antitrust-based claims" decided by the ITC, but denied the motion with respect to the horizontal conspiracy claim which had not been heard by the ITC.

9. The claim of horizontal conspiracy was tried to a jury in the U.S. District Court. After Aunyx rested, the trial judge directed a verdict for Canon on the theory that Aunyx had failed to prove "antitrust injury."

10. Aunyx took an appeal to the U.S. Court of Appeals for the First Circuit from a final judgment dismissing the claim of horizontal conspiracy.

11. The Court of Appeals affirmed the judgment for Canon on a theory of res judicata, stating that Aunyx could have asserted its horizontal conspiracy claim before the ITC (petition at pages 76-77).

Thus Aunyx has been deprived of the right to a decision on its horizontal conspiracy antitrust claim under Section 1 of the Sherman Act on a strange theory of "claim splitting" -- namely, that because (a) the ITC had jurisdiction to decide claims for violations of Section 337 of the

Tariff Act of 1930, and (b) the ITC could have decided that any conduct which violated Section 1 of the Sherman Act also violated Section 337, Aunyx therefore was required to assert any claim for violation of Section 1 of the Sherman Act in its original complaint in the ITC or be deemed to have waived that claim -- even though the ITC had no jurisdiction to decide any claim under the Sherman Act as such.

This novel decision disrupts the settled law of claim preclusion and threatens to cause chaos in proceedings before the ITC.

A prudent plaintiff is unlikely to commence proceedings before the ITC if by so doing it will run the risk of losing the right to pursue valid antitrust claims which are not within the jurisdiction of the ITC but could be found to violate Section 337 as well as the Sherman Act.

III. THIS CASE PRESENTS ISSUES OF CONTINUING IMPORTANCE IN A WORLD OF EXPANDING INTERNATIONAL TRADE IN WHICH UNITED STATES COMPANIES ARE BEING BATTERED BY UNFAIR PRACTICES OF OTHER NATIONS.

The respondent in its Brief in Opposition mocks the petitioners' suggestion that this case presents an issue of continuing importance with respect to the res judicata effect to be given to ITC decisions on claims within the exclusive jurisdiction of the United States District Courts, such as patent infringement claims and antitrust claims (petition at page 16), pointing to the fact that the application of res judicata to ITC antitrust rulings has been the subject of only two cases in 60 years (presumably referring to the two appellate decisions noted in its brief).

The respondent asserts that the petitioners' suggestion that the issue is of continuing importance "rings hollow" in light of the infrequency of appellate

decisions on point (Brief in Opposition at page 16).

Whatever the history of concomitant ITC proceedings and antitrust actions in the District Courts may have been in past years, no perceptive observer could deny that such matters are of rapidly intensifying importance in today's world.

Foreign manufacturers of automobiles have appropriated the American market to the point at which American manufacturers have reached the brink of extinction.

It is no longer possible to purchase a television set made in this country. Japanese companies dominate the market. See Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574 (1986).

Faced with meeting the onslaughts of foreign competition, American companies may increasingly seek protection from both the ITC and the federal courts (just as Aunyx did in the present case). It is of crucial

importance that they be able to predict the pitfalls of proceeding in both arenas concurrently, and the questions presented by the petition become more important with each passing day.

IV. THE QUESTIONS PRESENTED BY THE PETITION WERE RAISED AND DECIDED IN THE COURTS BELOW.

The respondent contends that the questions presented by the petition were not raised in or passed upon by the Court of Appeals (Brief in Opposition at pages 9-14). This is not so.

After dismissal of the petitioners' appeal from the adverse decision of the ITC, the respondent repeatedly moved for summary judgment in the District Court on the theory that the petitioners' antitrust claims (as well as other claims) were barred by principles of res judicata.

The petitioners opposed these motions, making the same arguments made in the petition (Brief in Opposition, page 11), and the

District Court denied the motions as they related to the horizontal conspiracy claim. See opinions reproduced in the appendix to the petition at pages 86-96 and at pages 97-105.

The res judicata issue was thoroughly briefed by the respondent in the Court of Appeals, and at oral argument in the Court of Appeals, the issue was argued by counsel for both the petitioners and the respondent. The petitioners relied upon the decisions of the District Court judges.

The res judicata issue was the sole basis of the decision of the Court of Appeals on the horizontal conspiracy claim (see opinion at pages 52 and pages 65-77 of the petition).

The questions presented relate to the only issue decided by the Court of Appeals, and there is no basis for respondent now to contend that the issue was not decided by the Court of Appeals.

V. AUNYX PRESENTED CONVINCING EVIDENCE OF "ANTITRUST INJURY" AT TRIAL.

The respondent argues at pages 26-28 of its Brief in Opposition that the petitioners' horizontal conspiracy claim is barred by failure to prove "antitrust injury" at trial in the District Court. This argument is without merit.

In Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489 (1977), this Court held that a plaintiff in a private antitrust action must prove "antitrust injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful" (emphasis in original). In Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 344 (1990), the Court ruled that proof of "antitrust injury," meaning that the loss stems from a "competition-reducing aspect or effect of the defendant's behavior," is required even in the case of a

per se violation of the antitrust laws (emphasis in original).

The evidence at trial showed that in the summer of 1985 the petitioners embarked upon a program of selling large amounts of NP Toner, purchased from the respondent, to end users throughout the United States (C.A. App. 372, 379-380). The petitioners had an established customer base of over 7,000 customers for copier supplies, including some of the largest companies in the United States (C.A. App. 376, 381, 546-547).

The petitioners had an experienced sales staff (C.A. App. 381), an ample line of credit to finance the program (C.A. App. 382, 466), and advantages not shared by other Canon dealers, such as use of company airplane for sales purposes (C.A. App. 327, 348, 576-577).

The petitioners intended to price the Canon NP Toner at 15 to 20 percent below the average prices charged by other Canon

dealers to end users (C.A. App. 382). This reduced pricing would have been extremely attractive to end users (C.A. App. 382), and the petitioners expected to realize net profits in excess of $17 per carton (C.A. App. 387, 555) on sales of at least 115,000 cartons per year (C.A. App. 552-554), although other Canon dealers would compete by reducing their prices (C.A. App. 382-383).

The restrictions which the respondent then imposed upon the quantities of NP Toner which it would sell to the petitioners put an end to the petitioners' program of selling NP Toner to end users on a nationwide basis (C.A. App. 449), thus depriving thousands of potential customers for NP Toner of the lower prices which would have been charged by the petitioners and by other Canon dealers who would reduce their prices to compete with the petitioners (C.A. App. 382-383).

There was evidence from which the jury could find that the restrictions were imposed by the respondent pursuant to a horizontal conspiracy of respondent and its dealers, as the trial judge recognized (Appendix B to the Brief in Opposition, at page 6a).

There also was ample evidence of injury to the petitioners (C.A. App. 387, 471, 555), directly resulting from the restrictions by the respondent.

In order to show "antitrust injury," Aunyx was not required to show that all end users in the United States and Canada would pay lower prices for NP Toner because of the Aunyx program. It was sufficient to show that some customers would have paid lower prices and that Aunyx would have realized profits from sales to those customers. Palmer v. BRG of Georgia, Inc., 498 U.S. ___, 112 L.Ed.2d 349 (1990); Reiter v. Sonotone Corp., 432 U.S. 330, 341 (1979);

Blue Shield of Virginia v. McCready, 457 U.S. 465, 479 (1982).

The argument by the respondent that the petitioners failed to prove "antitrust injury" at trial is without basis in law or fact.

CONCLUSION

For the reasons set forth in the petition and in this reply brief, a writ of certiorari should issue to the United States Court of Appeals for the First Circuit in this matter.

Respectfully submitted,

Blair L. Perry
5 Gerard Terrace
Lexington, MA 0213
(617) 542-5070

Counsel of Record for
Petitioners